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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 22

MAX LEVINSON,
Plaintiff-Petitioner

vs.

SPECTOR MOTOR SERVICE, a corp.,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To the Honorable

The Supreme Court of the United States:

Max Levinson, petitioner, respectfully prays that a writ of certiorari issue to the Supreme Court of Illinois, directing that Court to certify to the United States Supreme Court the record in the case of *Max Levinson* v. *Spector Motor Service, Inc.*, case No. 28309, in order that the decision and judgment of said Court rendered March 19, 1945, may be reviewed by this Court and, for sufficient grounds, reverse that Court's decision and judgment.

SUMMARY STATEMENT OF MATTERS INVOLVED.

On April 16, 1943, petitioner filed suit in the Municipal Court of Chicago, Illinois, against respondent Spector Motor Service, Inc. He sued under the Fair Labor Standards Act and alleged that respondent was a motor carrier in interstate commerce; that from October 1, 1939 to September 30, 1940, he was employed as a laborer, for which period no claim was made; that from October 1, 1940 and up to and including October 6, 1941, he was employed on a different basis at a salary of $150.00 per month, not as a laborer but to perform divers duties; that he worked 87 hours per week and was refused overtime pay. (Tr. 7-9.)

Respondent filed a defense denying petitioner's allegations, but admitting his new basis of employment and performance of the different duties described in the complaint except denying that petitioner checked payrolls. Respondent averred that petitioner was a dockhand, and that all his duties were the usual work of such a dockhand, and specifically exempt from the Fair Labor Standards Act.

Respondent later filed an amended defense, averring that the activities of respondent and its employees are under the specific jurisdiction of the Interstate Commerce Commission by reason of the U. S. Motor Carriers Act of 1935; that petitioner actually worked as a dockman, loader and dock foreman, and his duties were directly connected with the safety of vehicles. (Tr. 10 and 44.)

Trial was had before that Court without a jury. The evidence introduced showed that petitioner's status of employment was changed to that of a checker and he performed other diverse, fluctuating duties (Tr. 16); that in the performance of these duties he worked 87 hours per

week (Tr. 22); that the major or greater portion of the work done by petitioner did not directly affect safety of operation of motor vehicles.

Special findings of fact were entered by that Court. One of the findings were to the effect that the major portion of petitioner's duties did not affect safety of operation. Judgment was rendered against respondent in the sum of $1,149.88 and court costs, including liquidated damages and attorney's fees. (Tr. 11-13.)

Respondent appealed to the Appellate Court of Illinois. That Court reversed the judgment of the trial Court on the theory that, as a matter of law, if petitioner "performed any" work affecting safety of operation it is sufficient to deprive him of coverage under the Fair Labor Standards Act. (Appellate Court opinion appended.)

Petition for rehearing was filed and was denied, but the Appellate Court did at the same time grant a certificate of importance.

Appeal was then filed in the Illinois Supreme Court. In due time, L. Metcalf Walling, Administrator of the Wage and Hour Division of the Department of Labor, moved for leave to file a brief as *amicus curiae*. (Tr. 56-58.) In his suggestions in support of the motion, he stated that his interest is that of the public expressed in remedial statute of great importance designed to eliminate substandard labor conditions; that the responsibility of administering the Act is placed upon him; that he has a real and substantial concern in the interpretations and rulings that may be made in employee suits and the effect they may have on the administration of the Act; that this appeal involves the interpretations of Sections 204(a)(1) and (2) of the Motor Carrier Act and Section 13(b)(1) of the Fair Labor Standards Act; that the decision will affect

thousands of employees of motor carriers throughout Illinois and the United States; that his brief will concern the issue whether a "motor carrier employee who performs any duties" in safety of operation of motor vehicles is exempt from the overtime provision; that this is of first impression in Illinois, and that this point had not been decided by the United States or any United States Court of Appeals. The Court, however, denied the motion of L. Metcalf Walling and affirmed the Appellate Court decision.

Petitioner filed in due time a petition for rehearing, which the Supreme Court denied on March 19, 1945. (Tr. 71.)

Thus the petitioner was deprived of the judgment without due process of law and in violation of Section 1, Amendment XIV, U. S. Constitution.

BASIS UPON WHICH IT IS CONTENDED THAT THE UNITED STATES SUPREME COURT HAS JURISDICTION.

Petitioner's claim was predicated on Section 7 of the extremely important Fair Labor Standards Act, the purpose of which was to eliminate sub-standard living.

Section 13(b)(1) of the Fair Labor Standards Act (Section 213(b)(1), Title 29, U.S.C.A.) provides that the provisions of Section 7 of the Act dealing with maximum hours, and overtime compensation, under which this action was brought:

> "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act of 1935; * * *."

Because of the defense interposed by respondent, the U. S. Motor Carrier Act was drawn in, the pertinent part of which is:

> "It shall be the duty of the Commission—(1) To

> regulate common carriers by motor vehicles as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Trial was had without a jury in the Municipal Court of Chicago and judgment was rendered for petitioner based on specific findings of fact, among which was a finding that petitioner worked 87 hours per workweek and that the *major* portion of petitioner's duties by him performed did not affect safety of operation.

Respondent appealed to the Appellate Court of Illinois. It then became necessary for that court to give utmost consideration to the interpretation of the Labor Act and its applicability to the case at bar in the manner intended by the Act and as interpreted by the Federal District Courts and the United States Supreme Court. It was necessary to take into account and follow the interpretations of the Administrator of the Labor Act and also to place a proper construction on Section 204(a)(1) and (2) of the Motor Carrier Act of 1935 and to follow the decisions and interpretations of the Interstate Commerce Commission.

But the Appellate Court disregarded the foregoing and reversed the judgment on federal grounds as clearly shown by its opinion stating as follows:

> "There is no question that some part of plaintiff's work-week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders of his gang were exempt from Section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force plaintiff comes within the exemption for, if the loaders are exempt because the manner in which

that work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff who planned and directed the loading affected that safety. Considering the purpose of the Motor Carrier Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation rather than whether the duties affecting safety are substantial.

We need consider no other point.

It is our conclusion that the finding that plaintiff is not exempted is erroneous as a matter of law, and the judgment based thereon should be, and is, hereby reversed. * * *"

The Appellate Court was without authority in holding that the loaders of plaintiff's gang were exempt from Section 7 and that, therefore, with greater force he came within the exemption, because there was no issue, evidence, stipulation or finding in the record that the loaders were exempt. It thus follows that the Court's conclusion was wrong because it was based on a false premise.

In holding that the test of applicability of exemption is whether an employee performs "*any*" duties rather than whether such duties are *substantial* shows that the Court evolved a new theory of law diametrically opposed to the accepted Federal provisions, decisions and interpretations. The Court thus thwarted and distorted the Labor Act to such a peculiar extent that, if allowed to become the law, all employees in the freight industry similarly situated are at once deprived of the Labor Act coverage because they may have occasionally carried a package, or changed a label, or checked the damage to some parcel.

Petition for rehearing was filed and denied, but that Court granted a certificate of importance for appeal to the Supreme Court of Illinois.

Petitioner accordingly appealed to the Supreme Court,

and that Court affirmed the decision of the Appellate Court on federal grounds. The opinion of the Supreme Court appears at page 63 of the transcript and is reported in 389 Ill. 466. The finding of fact of the trial Court that the major part of petitioner's duties did not affect safety of operation was not disturbed by the Appellate Court nor by the Supreme Court.

The determinant formulated by the Appellate Court was the only basis for the reversal of the trial court judgment. The Supreme Court admitted this to be erroneous. Inasmuch as this was the only theory upon which that decision was founded, it was the plain duty of the Supreme Court to reverse the Appellate Court and affirm the trial court judgment.

The Supreme Court's decision states as follows (Tr. 68):

> "The Appellate Court found that the loaders in appellant's gang were exempted from Section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation.
>
> "The substantial effect of the comment of the Appellate Court was to the effect that the quantity of petitioner's activities was not the true test of exemption from the Fair Labor Standards Act, yet said Court did hold appellant was in the same position as loader."

From the above it is evident that the Supreme Court based its decision on a supposition of the Appellate Court, which is designated by the Supreme Court itself as a *comment*. This supposition, as stated before, has no basis whatsoever in the record. Moreover, from the above quotation it also appears that the Supreme Court's inference that the substantial effect of the comment of the Appellate

Court was that the quantity of petitioner's activities was not the true test of the exemption. This is clearly a misconception. The Appellate Court decision is plain and leaves no room for inferences. It is limited and narrowed to their formula by their express words. They state in the decision: "We need consider no other point." The test or determinant formulated in said decision is that one who performs *any* duties in safety of operation is exempt from the benefits of the Labor Act. It is clear that both the Appellate and the Supreme Court decisions are founded on a misinterpretation of the Labor Act, as well as the Motor Carrier Act.

Furthermore, the Interstate Commerce Commission is vested by law with sole power to decide and rule with respect to employees over whom it asserts jurisdiction. Repeated demands have been made on that Commission to extend its jurisdiction over all motor carrier employees and it consistently refused to do so. On the above decisions no claim of a freight industry employee can sustain a right to Labor Act coverage, thus the decision is in fact legislative and invades the province of the Commission's jurisdiction by inclusion of types of employees whom they consistently excluded.

In *Illinois Steel Co.* v. *B. & O. R. R. Co.*, 320 U. S. 50, the basis of the suit was to recover freight charges, and involved clauses of the Uniform Bill of Lading adopted by the Interstate Commerce Commission and prescribed by Congress for interstate shipments. This Court held that the case presents a Federal question, the determination of which by a State Court is subject to its review, and a writ of certiorari was granted on the ground that interpretation of that Act under the circumstances of the case is a question of public importance.

In *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, this Court ruled similarly on a petition for a writ of certiorari in an action under the Federal Employers' Liability Act.

In *Davis* v. *Aetna Acceptance Co.*, 293 U. S. 328, the writ issued to reverse an erroneous state court decision which was based upon misapplication of the Bankruptcy Act.

In *McCullough* v. *Smith*, 293 U. S. 228, the writ was granted to reverse an erroneous decision misapplying the World War Veterans' Act.

In *Atlantic Coast Line R. Co.* v. *Temple*, 285 U. S. 143, the writ was granted where the state court, although purporting to apply the statutory tests of liability under the Federal Employers' Liability Act as established in prior Supreme Court decisions, has in fact permitted recovery upon proof insufficient to sustain a finding of negligence.

Sovereign Ry. Co. v. *Moore*, 284 U. S. 581, has in fact ignored or misapplied the statutory rule relating to assumption of risk.

Atchison T. & S. F. Ry. Co. v. *Saxon*, 284 U. S. 458, has sustained a recovery without proof that the alleged negligence was the proximate cause of the injury.

In *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, its judgment fails to give effect to the established rules relating to injuries resulting from disobedience of rules or orders.

To the same effect are the cases in *St. Louis S. W. Ry. Co.* v. *Simpson*, 286 U. S. 346; *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313—and *Same* v. *Dantzler*, 286 U. S. 318.

In *Denton* v. *Yazoo and M. V. R. Co.*, 284 U. S. 285, the

writ issued to inquire whether the state court had rightly applied the regulations and the rules of the law of master and servant in determining whether a negligent worker was the servant of the U. S. or of a railroad company at the time of the injury.

In *St. Louis I. M. & S. Ry. Co.* v. *Taylor*, 210 U. S. 281, 293, a refusal by a state court to give a federal statute or treaty the construction insisted upon by a party which would lead to a judgment in his favor is a denial of a right or immunity under the laws of the U. S.

Hopkins Fed. Sav. & Loan Assn. v. *Cleary*, 296 U. S. 315, 332.

State court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

QUESTIONS PRESENTED.

Did the Supreme Court of Illinois adhere to the Labor Act Administrator's interpretation that the power exists in the Interstate Commerce Commission to fix the maximum hours of work of drivers, helpers, mechanics and loaders, and such employees are presently exempt under Section 13(b)(1) and that all other classes of common, contract and private motor carriers are clearly not within the exemption contained in Section 13(b)(1)?

Did the Supreme Court of Illinois adhere to the interpretation of the Labor Act Administrator that even as to truck drivers, helpers, mechanics or loaders employed by a common carrier WHO SPEND THE GREATER PART OF THEIR TIME DURING ANY WORK-WEEK ON NON-EXEMPT ACTIVITIES, SUCH AS

PRODUCING, PROCESSING OR MANUFACTURING GOODS, WAREHOUSE OR CLERICAL WORK, OR OTHER TYPES OF WORK WHICH DO NOT AFFECT SAFETY OF OPERATION, such employees are not within the scope of the exemption contained in Section 13(b)(1)?

Did the Supreme Court of Illinois misapprehend and disregard the fact that the Interstate Commerce Commission is vested with sole power to limit jurisdiction and it did so limit its jurisdiction to cover four classes of employees, viz., mechanics and other garage workers, loaders, drivers and driver's helpers and that therefore, it had no power to go behind that decision and broaden the coverage of the Commission's jurisdiction?

Did the Supreme Court of Illinois follow the decisions of this Court and Federal District Courts that even as to the aforesaid exempt classes of employees the further qualification must appear that the greater part of their duties *DIRECTLY* affect safety of operation, otherwise they may still be entitled to the benefits of the Labor Act?

Did the Supreme Court of Illinois misapprehend and disregard the fact that petitioner was a checker and performed other non-exempt duties and was not in any of the classes of employees over whom the Commission asserted jurisdiction, and did that Court disregard the special finding of the trial Court that the major part of his work did not affect safety of operation of motor vehicles?

Did the Supreme Court of Illinois err in denying the motion of the Labor Administrator to intervene in this cause as *amicus curiae* and in excluding the material matters he attempted to present to support the judgment of the trial Court?

Did the Appellate and Supreme Courts of Illinois correctly assume that petitioner was in the position of a leader, even though the evidence on both sides agreed that he was a checker and performed other diverse duties, and did the aforesaid Courts, based on that assumption alone, correctly apply the appropriate Federal decisions and pertinent interpretations?

Did the Supreme Court have any right to affirm the Appellate Court decision after stating that that Court was in error as to the test or determinant used to reverse the trial court judgment simply by drawing inferences from the Appellate Court comment when said Appellate Court limited and narrowed its decision by expressly stating: "we need consider no other point"?

REASONS FOR ALLOWANCE OF WRIT.

The writ should be allowed because petitioner's claim was based on a Federal Statute of far reaching importance in the economy of the States and of the nation as a whole. It vested petitioner with substantive rights and benefits, which State courts cannot impair. But the Supreme Court of Illinois did impair those rights, contrary to the Labor Act, intentions of Congress, interpretations of the Labor Administrator and decisions of the District and United States Supreme Courts.

The trial Court found in the instant case, as a matter of fact, that plaintiff worked 87 hours during each week and was not paid for overtime in violation of Section 7(a). Most important of all, the trial Court found specifically that the major portion of petitioner's work did not affect safety of defendant's operation within the meaning of Section 13(b) of the Labor Act, and was not exempt under said Section. Judgment was rendered accordingly

for petitioner, and it became his property; he had a right to the enjoyment of its benefits, and he should not have been deprived thereof.

In contesting respondent's appeal to the Appellate Court of Illinois, petitioner contended that he was employed as a checker and performed other duties; that the *major* part of his duties did not affect safety of operation and was not exempt. He cited numerous cases to support this contention: *McKeown* v. *Southern California Freight Forwarders*, 6 Labor Cases, 61,521, which involved a checker of freight and also frequently assisted in loading and unloading. This case is in all respects similar to the instant case because petitioner, too, was a checker and performed other duties; *Overnight Motor Transportation Co. Inc.* v. *Missel*, 316 U. S. 572, wherein plaintiff was a rate clerk performing other fluctuating duties and this Court accorded him the benefits of the Act; *Anuchick* v. *Transportation Freight Co.*, 6 Labor Cases, 61,245, wherein plaintiffs were mechanics who, as a class, were specifically under the jurisdiction of the Interstate Commerce Commission, yet, on their showing that a *substantial* part of their duties were performed in *non-exempt* work, they were allowed to recover. It was there stated:

> *"Technically there isn't any employee of a transportation company that isn't indirectly doing work affecting safety of operation but we believe the Interstate Commerce Commission had a definite thought in mind in rendering its decision.*
>
> "In our interpretation of the theory and reasoning of the Interstate Commerce Commission as set forth in its decision of March 1941 and in fact if there is to be a division in category of defendant's employees—it is evident that all plaintiffs here (2830) are concerned with the safety and size of car and that any activity affecting 'safety of operation' is

incidental. We therefore hold that these plaintiffs are not subject to the rules and regulations of the Interstate Commerce Commission affecting their qualifications and maximum hours of service. Such we believe to be the interpretation of their own powers by the men who know." (Emphasis ours.)

Petitioner also urged that the Statute charged the Administrator with applying the Act, and that the United States and Federal District Courts regard his interpretations of its provisions with great weight. The following portion from his Interpretive Bulletin No. 9 was cited:

"It should be noted that any truck driver, drivers' helpers, mechanic or loader employed by a common, contract or private carrier, who spends the greater part of his time during any workweek on non-exempt activities, such as producing, processing or manufacturing goods, *warehouse or clerical work, or other type of work which does not affect safety of operations* is not within the scope of the exemption contained in Sec. 13(b)(1). It is the opinion of the Division that Congress did not intend that this exemption should be available as a vehicle to exempt employees who spend most of their time to work other than that which forms the basis of the exemption." (Emphasis ours.)

The case of *Keegan et al.* v. *Ruppert et al.*, 7 Labor cases 61,726, involved a garage worker, who likewise was specifically exempt from the Act, but, upon showing that a substantial part of his duties were performed in non-exempt work, he was allowed to recover. In *Ralph Knight Inc.* v. *Mantel*, 7 Labor Cases, 61,591, plaintiff was allowed to recover, and the Court stated therein that the Act must be liberally construed to effect its purpose; that all employees in interstate commerce, so far as is reasonably possible, should be made subject to the provisions of the Act; that exemptions would tend to defeat

its purpose, and therefore such exemptions should be strictly construed.

The Appellate Court failed to adhere to the foregoing cases, and evolved a new and unknown theory of law to the effect that the true determinant is whether an employee performs "any" duties which substantially affect safety of operation, rather than whether the duties affecting safety are substantial. This theory was volunteered by that Court and was not urged by Respondent. The Court cited no authority for that theory. In fact, such authorities cannot be found. If this decision was allowed to stand, it would thwart and narrow the far reaches of the Labor Act and tend to deprive thousands upon thousands of employees, engaged in the interstate motor carrier industry, of the benefits of the Labor Act. Therefore, plaintiff appealed to the Supreme Court of Illinois and urged the foregoing points to reverse the decision. The Labor Administrator, realizing the importance of the case, sought to intervene in the Supreme Court as was his duty. His stated intention was to show that the final decision in this case will affect thousands of employees of the motor carrier industry throughout the State of Illinois and the nation at large; that he desired to file a brief as *amicus curiae* on the question: May an employee who performs "any" duties which affect safety of operation of motor vehicles be exempt from the overtime provisions of Section 7(a) of the Labor Act by virtue of Section 13(b)(1) thereof? He further stated that the point involved is one of first impression, and has never before been decided or presented to that Court or to the United States Circuit Court of Appeals or to the Supreme Court of the United States. Nevertheless, the Administrator's motion to file such a brief was denied. Thereafter that Court affirmed the decision, even after

admitting that the Appellate Court may have been in error as to this true test or determinant.

The Supreme Court held the true determinant or test is whether the duties affecting safety or operation were "*substantial*" and not whether petitioner performed "any" or "some" duties. If the Supreme Court's pronouncement of the true determinant or test is correct, then the decision of the Appellate Court was not justified and should have been, of necessity, reversed and the judgment of the trial Court affirmed. There was no adjudication in the record that petitioner's duties in safety of operation were *substantial*, but there is a specific trial Court finding that the *major* portion of petitioner's duties did *not* affect safety of operation, which means that the duties affecting safety were in fact not substantial. It is thus clear that the determinants or tests formulated by the Appellate and Supreme Courts did not warrant reversal of the judgment of the trial Court. The trial Court's specific finding that the *major* portion of plaintiff's duties were not performed in safety of operation means that the converse must be true, that only a small or minor portion of time was left for him to devote to safety of operation. The Appellate Court of Illinois, in *Zenith Radio Distributing Corp.* v. *Mateer*, 311 Ill. App. 263, has defined the meaning of the word "major" as follows:

> "The word 'major,' as used in Bulk Sales Act, which requires compliance with the Act in the case of a major part of a seller's business, must be construed in its ordinary meaning and, as so construed, means greater or larger."

Webster's New International Unabridged Dictionary defines "major" as greater in number, quantity or extent; as, the major part of the assembly; the major part of revenue.

It is respectfully submitted that this case is of great public interest and of sufficient importance. It involves the misapplication and disturbance of unanimity of federal decisions and interpretations of the aforesaid sections of the Labor Act and the Motor Carrier Act to merit the issuance of a certificate of certiorari by this court to the end that the decision of the Supreme Court of Illinois may be reversed and the judgment of the trial Court affirmed.

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APPENDIX.

Opinion of the Appellate Court.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT:

This is an action brought by virtue of section 16 (b), for violation of the maximum hours provision (section 7), of the Fair Labor Standards Act of 1938 (52 U. S. Stats. 1060), designed to spread employment and maintain health. *Southland Gasoline Co.* v. *Bayley, et al*, 6 Labor Cases, 51159. Judgment was for plaintiff in the amount of $1,149.88. Defendant has appealed.

Defendant is a Missouri corporation, licensed in Illinois and engaged in interstate commerce as a motor carrier of freight, by which plaintiff was employed from October 1, 1939 to October 6, 1941. He claims that he worked 87 hours per week for the period from October 1, 1940 to October 6, 1941, during which defendant violated section 7 of the Act by refusing to pay him time and a half for all hours in excess of 42 hours per week during the period from October 1, to October 24, 1940; and for all hours in excess of 40 hours per week from October 25, 1940 to October 6, 1941, less one week's vacation. The maximum working hours are established in section 7 (a), (1), (2) and (3) of the Act.

Defendant's affirmative defense is that the nature of plaintiff's employment, exempted him from the provisions of the Act, (section 13) and brought him under the exclusive jurisdiction of the Interstate Commerce Commission, since his duties were those of "dock man", "loader" and "dock foreman" and directly connected with the safety of equipment and cargo in Interstate Commerce.

The trial court found in its judgment order entered December 28, 1942, that the plaintiff worked 87 hours per week during the period for which the suit was brought and that the *major portion* of the work performed by him during that period did not affect the safety of defendant's operations and that plaintiff was not exempted from the provisions of the Act. The defendant argues that the finding that the plaintiff is not exempted is erroneous as a matter of law and is against the manifest weight of the evidence; and also that the amount of the judgment entered exceeded the court's jurisdiction in plaintiff's fourth class action.

Section 13 (b) exempts from the provisions of section 7 of the Act any employee subject to the jurisdiction of the Interstate Commerce Commission under section 204 of the Motor Carrier Act of 1935 (49 U. S. Stats. 543). That section empowers the Commission to regulate the qualifications and hours of service of employees whose activities affect the safety of operation. *United States* v. *American Trucking Association,* 310 U. S. 534, 553. The decisive question on the merits is whether plaintiff is such an employee.

In the *Trucking Association case,* the court said that "the interpretation of the Interstate Commerce Commission and the Department of Labor are entitled to great weight". In *Ex parte* No. M. C.-2, Vol. 28 Interstate Commerce Commission Reports, page 125, the Commission interpreted the term "safety of operation" used in that case to include employees who devote a *substantial part* of their time to activities which directly affect safety of operation; that among such employees were "loaders", variously called "loaders, dock men or helpers", who devote a *large* part of their time to activities directly affecting safety of operation and whose sole duties are to *load and unload* motor

vehicles, etc. Plaintiff contends he is a checker, not a loader, and therefore, not within the Commission's interpretation. We believe that his duties—not the name given his position—are determinative. To preclude the exemption provided in Sec. 13 B of the Act from applying to him, plaintiff relies upon *McKeown* v. *Southern California Freight Forwarders*, 6 Labor Cases (U. S. District Court, Southern District of California) 61521; *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Magann* v. *Longs Baggage Transfer Co.*, 39 Fed. Supp. 742; and mainly upon *Anuchick, et al.* v. *Trans-American Freight Lines*, 6 Labor Cases (U. S. District Court, Eastern District of South Michigan) No. 61,245. The facts in the first two, place the employee plainly outside the exemption; and in the third, a truck driver was found to be exempt. In the *Anuchick case*, the court found that certain employees devoted a *substantial part* of their time to work not directly affecting safety of operation and, on the theory that it was bound by the Department of Labor's interpretation of the term "substantial" in Bulletin No. 9, gave judgment for the employees. The interpretation in Bulletin No. 9 then prevailing was that "substantial" meant *in excess of 20%* of duties not connected with *loading and unloading*. Bulletin No. 9, as revised to October 1943, modifies the earlier interpretation to mean "the *greater part* of his time during any work week on non-exempt activities." We assume the court in the *Anuchick case* would have accepted this later interpretation had it then been effective and unless the employees there spent the *greater part* of their time on duties not directly affecting safety, would have held against them. These various interpretations suggest the difficulty of finding the proper rule here. The trial court apparently applied the later interpretation of the Department of Labor.

Defendant Terminal at 600 West 25th Street, Chicago, is the scene of three phases of motor carrier business—inbound freight, outbound freight and local freight. Trucks carrying freight originating locally and in foreign cities and States, are unloaded by gangs of defendant's employees. A gang usually consists of 3 or 4 men—a checker, caller, sorter and packer. The checker directs the gang's operation. Day and night foremen supervise the activities of all the gangs. Incoming freight is unloaded and deposited according to its destination on the dock in various sections at the direction of the checker; likewise under the direction of the checker, it is removed from these sections and loaded on appropriate outgoing trucks. It is loaded according to size and weight; heavy weighted or "bottom freight" being distributed in the lower part of the truck and lighter weighted or "balloon freight" is placed at the top. This plan is followed in the interest of safety of equipment and of freight. Testimony pertinent to the issue on the merits is that, as checker, plaintiff supervised and directed the unloading and disposition of incoming freight and the collecting and loading of outgoing freight and that he watched the disposition of the weight of the freight in loading. The dispute in the testimony arises as to the quantity of plaintiff's activities devoted to these particular duties. Plaintiff says that most of the outbound freight was done at night, while he worked mostly days; that not much loading was done during his hours, but that, whatever took place, was under his direct charge. The defense testimony is that inbound and outbound freight was equally divided during the day—inbound usually during the night and outbound between 8 A. M. and midnight.

We believe none of the foregoing interpretations are helpful in determining this issue. Section 204 of the Motor Carriers Act is designed to provide safety in an efficient

motor transportation system: *United States* v. *American Trucking Association*, 310 U. S. 534. There is no question that some part of plaintiff's work week was devoted to the direction and supervision of the loading of interstate motor freight carriers. There is no question either that the loaders in his gang were exempted from Section 7 of the Fair Labor Standards Act. We think, therefore, that with greater force, plaintiff comes within the exemption for, if the loaders are exempt because the manner in which they work affects the safety of the operation of defendant's motor vehicles, certainly the duties of plaintiff, who planned and directed the loading, affect that safety. Considering the purpose of the Motor Carriers Act, we believe that the true determinant is whether an employee performs any duties which substantially affect the safety of operation, rather than whether the duties affecting safety are substantial.

We need consider no other point.

It is our conclusion that the finding that plaintiff is not exempted is erroneous as a matter of law and that the judgment based thereon should be and it hereby is reversed and the cause is remanded with directions to enter judgment for costs for defendant against plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS TO ENTER JUDGMENT FOR COSTS FOR DEFENDANT AND AGAINST PLAINTIFF.

BURKE, P. J. and LUPE, J. Concur.